



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION III
1650 Arch Street
Philadelphia, Pennsylvania 19103-2029

February 1, 2002

Lieutenant General Bruce A. Wright
Vice Commander, Air Combat Command
ACC/CV
205 Dodd Boulevard
Suite 207
Langley Air Force Base, Virginia 23665-2789

Re: Air Force January 25 Publication of Remedy Decision Documents and DoD's
challenge to EPA's Authority Post-Record of Decision

Dear General Wright:

By this letter, we hereby notify the Air Force that it has exceeded its authority under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) § 120 by publishing on January 25, 2002, documents that purport to select certain remedial actions at Langley Air Force Base. Because EPA and the Air Force have not yet reached complete agreement as to the appropriate remedial actions at Langley Air Force Base, the Air Force's documents cannot be considered Records of Decision (RODs) as contemplated by CERCLA and the National Contingency Plan (NCP). As we stated to you in EPA's January 11 letter and to DoD in EPA's January 18 letter (enclosed), the Air Force has no authority under CERCLA to sign or publish independently the RODs which memorialize remedy decisions.

There is no agreement between the Air Force and EPA on certain components of the selected remedy. In particular, the Air Force-drafted decision documents omit the requisite language on institutional controls and various post-ROD maintenance requirements which are necessary to assure that the remedy selected is protective of human health and the environment. We enclose specific changes to the documents published by the Air Force on January 25 which we believe must be made to ensure protectiveness of the remedies.

Because the Air Force has published its documents and will place them in the Administrative Record, EPA, likewise, will ensure that this letter is part of the Administrative Record. EPA expects the Air Force to place this letter in both the Administrative Record on the Langley Air Force Base and at the Information Repository in the Hampton Central Library. This letter informs the public of EPA's views concerning the Air Force's actions with respect to the January 25 remedy documents.



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The issue preventing agreement on the Langley Air Force Base RODs is a national issue, much broader than Langley Air Force Base, regarding EPA's authorities to require certain post-ROD activities at a Federal facility on the National Priorities List (NPL). DoD's view that EPA has no oversight role at a Federal facility post-ROD is contrary to Congressional intent that EPA help ensure that cleanups by the Federal government are protective. EPA's role also helps garner a local community's confidence in Federal cleanup decisions. The Air Force's position regarding EPA's role, as stated in its January 23, 2002 policy on remedy selection, is for EPA to have participation opportunities through all phases of the cleanup by means of voluntary arrangements. There would be no independent regulatory approval that post-ROD actions were protective of human health and the environment.

The Air Force's and the DoD's position fails to recognize that Congress, in enacting Section 120, intended to make Federal agencies subject to EPA and state oversight just as private potentially responsible parties (PRPs) are subject to external oversight. Although E.O. No. 12580 delegates some CERCLA authority to DoD, the Air Force, nevertheless, is a responsible party. The Air Force and DoD's challenge to EPA's post-ROD authorities is contrary to the express purpose that Congress intended in creating Section 120, namely that Federal agencies should be subject to and accountable for their actions just like private parties.

Another aspect of this national dispute is that the Air Force and DoD refuse to recognize that key post-ROD documents be included as enforceable documents in a Federal Facility Agreement (FFA). In response to this refusal, EPA has specified that these documents be included as part of the remedy document--the ROD. A remedy represents the totality of activities that are needed to ensure protection of human health and the environment, not just the design and construction components. Currently there are approximately two dozen DoD RODs affected by this particular dispute in states such as California, New Jersey, Florida, Arizona, Wyoming, Utah, and Georgia.

As Marianne Horinko, EPA Assistant Administrator, Office of Solid Waste and Emergency Response, and J. P. Woodley, Deputy Assistant Under Secretary of Defense for Environment, agreed, by this letter EPA also provides the proposed dispute process as discussed during their January 25 meeting. EPA and DoD will simultaneously exchange detailed statements of the dispute on February 22, 2002 regarding EPA's post-ROD authorities at Federal facilities on the NPL. Once the simultaneous exchange occurs, Region III's Deputy Regional Administrator or the Regional Administrator will attempt to reach agreement with the Deputy Assistant Secretary of the Air Force (Installations and Environment) within 21 days. If the parties are unable to reach agreement, then Marianne Horinko and J.P. Woodley will try to reach consensus within a 21-day time frame. Should they be unable to resolve the dispute, then Ms. Horinko and Mr. Woodley will try to agree on next steps.

We hope to work with the Air Force and DoD at Langley Air Force Base and other Air Force facilities affected by this dispute to ensure cleanup continues. EPA will also work with the other services and DoD at similarly situated sites to ensure cleanups continue. Regarding the dispute process, the more we strictly adhere to the time frames, the sooner remedy decisions can be finalized ensuring protection of public health and the environment. We look forward to our simultaneous exchange of positions on February 22.

Sincerely,


Abraham Ferdas, Director
Hazardous Site Cleanup Division

Enclosures

cc: Marianne Horinko
Sylvia Lowrance
J. P. Woodley, DoD



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JAN 18 2002

OFFICE OF
SOLID WASTE AND EMERGENCY
RESPONSE

John Paul Woodley, Jr.
Assistant Deputy Under Secretary of Defense (Environment)
3000 Defense Pentagon
Washington, D.C. 20301-3000

Dear Mr. Woodley:

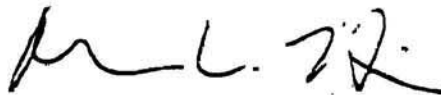
This letter replies to your January 14, 2002 letter wherein you indicate your continued intention to issue guidance to DoD components to sign RODs which contain a reservation of rights clause that addresses the issues under dispute at Langley Air Force Base. You also proposed that our staffs negotiate a final version of that clause by January 18, 2002. Further, you stated that you expect EPA to invoke dispute resolution with respect to Langley.

First, please note that even if we were to agree to the reservation of rights approach, my staff, the enforcement staff, our counsel, and Region III staff are out of the office this week attending a national Federal facilities meeting and would be unable to negotiate any language by the 18th. DoD has not made a convincing case that RODs must be signed prior to obligation of funds for remedial action. We continue to believe that nothing in the statute prohibits DoD from using its removal authority to carry out actions consistent with the anticipated remedial action. I continue to believe that the best way to expedite resolution of this issue is to use the model dispute procedures we provided to General Wright in the December 20, 2001 letter. However, we are ready to work with you to develop an approach to ensure cleanup continues, although not necessarily the approach where a ROD is signed containing a reservation of rights clause.

With respect to the dispute process, in EPA Region III's letters of December 20 and January 11 to General Wright, EPA indicated that it plans to sign the EPA-drafted RODs, if DoD fails to submit a detailed statement of the dispute by January 25, 2002. As noted in EPA's January 11 letter to the Air Force (enclosed), EPA believes that the Air Force has already initiated the dispute through its sending signed RODs which fail to contain adequate provisions for institutional controls and other post-ROD requirements. Given the unambiguous language of CERCLA Section 120(e)(4)(A), we continue to believe that DoD has no authority to unilaterally sign RODs selecting remedies at Federal facility sites on the NPL. Finally, as we also indicated in our January 11 letter, EPA remains willing to entertain changes to the dispute process. As an example, we have agreed that it makes sense to include the Office of the Secretary of Defense in the dispute process, and we have offered to truncate the dispute resolution time frames.

Like you, I look forward to our meeting on January 25, 2002. I share your desire to resolve our differences expeditiously and encourage you to continue with cleanup at Langley Air Force Base. EPA certainly agrees to resolve our differences within the Executive Branch; however, if DoD decides to publish the Langley RODs or any other RODs without EPA concurrence, it will be impossible to avoid notifying the public of the nature of our dispute. My continued hope is that the Air Force will submit its detailed basis for the dispute by January 25; otherwise, EPA intends to sign the December 20 RODs. Please feel free to call me at 202-260-4610 if you wish to discuss this further prior to our January 25th meeting.

Best regards
Sincerely,



Marianne Horinko
Assistant Administrator

Enclosure

The following language on implementation, monitoring, reporting, and enforcement of institutional controls and post-ROD activities such as Operation and Maintenance Plans, the Five-Year Review Report, and the Remedial Action Completion Report should be inserted into the ROD for OUs, 21, 23, 33, 35, 37, and 44 and the ROD for OUs 25, 28, 29, and 30. Additionally, all relevant portions of each ROD should be made to be consistent with this language.

**LANGLEY AIR FORCE BASE
OPERABLE UNITS 21, 23, 33, 35, 37, AND 44
ERP SITES LF-01, LF-05, LF-15, LF-18, LF-22 AND FT-41**

SITE NAME AND LOCATION

Langley Air Force Base, (CERCLIS ID # VA2800005033)

Operable Unit 21 (Site LF-01)

Operable Unit 23 (Site LF-05)

Operable Unit 33 (Site LF-15)

Operable Unit 35 (Site LF-18)

Operable Unit 37 (Site LF-22)

Operable Unit 44 (Site FT-41)

Institutional Controls; including:

- a. Within 180 days of ROD signature, the USAF shall prepare and submit to EPA and VDEQ for review and approval a Basewide Institutional Control Implementation Plan (BICIP) which is a comprehensive facility-wide approach for implementing, enforcing, and monitoring institutional controls. The BICIP will be appended to and be an enforceable part of this ROD and will:
 - i. Include a comprehensive facility-wide list of all areas covered by any and all decision documents at the facility that have or should have ICs for protection of human health or the environment. The information on this list will include, at a minimum:
 - the location of the area
 - the objectives of the restriction or control
 - the time frame that the restrictions apply, and
 - the tools and procedures the facility will use to implement the restrictions or controls and to evaluate the effectiveness

of these restrictions or controls;

- ii. Regulate all entities and persons, including, but not limited to, employees, contractors, lessees, agents, licensees, residents of the base, and invitees and ensure that these individuals observe the restrictions;
 - iii. Regulate all activities, and reasonably anticipated future activities, including, but not limited to, any anticipated future soil disturbance, routine and non-routine utility work, recreational activities, paving, troop training activities, construction, renovation work on structures or other activities;
 - iv. Include a process for all land areas under restriction or control (under i, above) which can be accessed by facility personnel when planning facility activities covered in iii, above, and or any potential transfers in property ownership;
 - v. Include a process to promptly notify the EPA and VDEQ prior to any anticipated major change in land use designation, restriction, land users or activity for any IC selected by a decision document.
 - vi. Include a process to make the annual monitoring report and any notifications under d (below) available to the public. Identify a point of contact for implementing, maintaining, reporting, and monitoring institutional controls.
- b. Within 90 days of ROD signature, the USAF shall prepare and submit to EPA and VDEQ for review and approval an Institutional Control Implementation Plan (ICIP) for implementing, reporting on and enforcing the institutional controls at OUs 23, 35, 37, and 44. This ICIP will be appended to and be an enforceable part of this ROD. The USAF shall monitor the ICs on the frequency determined as part of the ICIP. At a minimum, the following information shall be included in the ICIP:
- i. Identification of the OU 23, 35, 37, and 44 IC objectives:
Objectives for OUs 23, 35, 37:
 - prohibit residential and commercial use
 - prohibit industrial use that is inconsistent with the exposure assumptions
 - maintain the integrity of the soil cover

- prevent construction of facilities or structures or other land disturbance activity into or on the surface of the landfill;

Objectives for OU 44:

- all uses other than industrial
 - maintain current physical barriers;
- ii. A description of the actions required to achieve each objective (e.g., prepare a survey plat) for OUs 23, 35, 37, and 44;
 - iii. A description of how the USAF is monitoring and enforcing the IC requirements for OUs 23, 35, 37, and 44 ;
 - iv. A description of the process for removing or modifying the ICs; and,
 - v. Identification of the monitoring frequency and requirements.
- c. The Air Force will submit to the EPA and VDEQ, a monitoring report on the status of their ICs at least annually. The IC monitoring report, at a minimum, must contain:
 - i. An evaluation of whether all the facility-wide and IC commitments are being met, including results of visual field inspections of all areas subject to restrictions;
 - ii. Description of any deficiencies in the ICIP and BICIP and what efforts or measures have been or will be taken to correct problems.
 - d. The USAF shall notify the EPA and VDEQ within 72 hours upon discovery of any activity that is inconsistent with the OU 23, 35, 37, and 44 IC objectives for the site, or of any change in the land use or land use designation of a site addressed under item a.i, above. The USAF shall also identify the cause of the problem with the IC process, evaluate how to correct the BICIP and/or ICIP to avoid future problems, and implement these changes after obtaining the approval of EPA and VDEQ.
 - e. The USAF shall request funding and document its efforts to obtain funding to institute and maintain institutional controls.
 - f. The USAF shall notify EPA and VDEQ at least six (6) months prior to any transfer, sale or lease of any property subject to ICs under the terms of a decision document so that EPA and VDEQ can be involved in discussions to

ensure that appropriate provisions are included in the conveyance documents to maintain ICs.

- g. The USAF shall not modify, delete or terminate any IC unless the EPA and VDEQ have concurred in the modification, deletion or termination.
- h. The USAF shall be responsible for implementing, monitoring, reporting on and enforcing land use restrictions to prohibit all uses other than recreational, maintain the integrity of the soil cover, and prevent construction of facilities or structures or other land disturbance activity onto or on the surface of the landfill for the duration of the remedy.
- i. Within 90 days of demobilization, the Air Force shall produce a survey plat prepared by a professional land surveyor registered by the Commonwealth of Virginia including the known location and dimensions of OUs 23, 35, 37, and 44 and the known extent of buried waste materials as well as the boundaries and conditions of the use restrictions;
- j. The Air Force shall supply a copy of the plat and ensure the incorporation of these restrictions into any real property documents necessary for transferring ownership from the United States, in the unlikely event that the United States sells or transfers the property. The real property document would also include a discussion of the National Priorities List (NPL) status of this Site, as well as a description of the soil contamination and buried waste materials. The Air Force shall submit the survey plat to the City of Hampton recording authority for the purpose of providing public notice of the environmental conditions of and limitations on the use of the property. (No property right or interest is intended to be nor shall be created by such notice.) In addition, the Air Force shall enter a note, in the local land use recording office, to the real property document evidencing U.S. ownership of the property on which the OU is located that shall notify interested parties that the site was previously used as a disposal area.

In order to ascertain whether or not the selected remedies are implemented according to design, have achieved the stated goals, and continue to be effective and protective over time, the Air Force shall prepare in accordance with EPA Guidance and submit to the EPA and VDEQ for review and approval a Remedial Action Completion Report, an Operation and Maintenance Plan,

and a Five-Year Review Report for each operable unit remedial action. The Air Force shall submit the Five-Year Review Report in accordance with the statute's time frames and the Air Force shall submit the Remedial Action Completion Report and the Operation and Maintenance Plan within 60 days of EPA's request. The Remedial Action Completion Report shall outline in specifics the remedial action taken and shall detail, and provide an explanation for, any activities that were not conducted in accordance with the final, approved Remedial Design document and/or Remedial Action Work Plan. The Operation and Maintenance Plan shall define the administrative, financial, and technical details and requirements for inspecting, operating, and maintaining the selected remedial action. The Five-Year Review Report shall contain the findings and conclusions of the review, including recommendations, follow-up actions to issues, and a protectiveness determination. The Remedial Action Completion Report(s), the Operation and Maintenance Plan(s) and the Five-Year Review(s) shall be incorporated into and be an enforceable part of this ROD.

LANGLEY AIR FORCE BASE
OPERABLE UNIT 25 (Site LF-07)
OPERABLE UNIT 28 (Site LF-10)
OPERABLE UNIT 29 (Site LF-11)
OPERABLE UNIT 30 (Site LF-12)

SITE NAME AND LOCATION

Langley Air Force Base (CERCLIS ID# VA2800005033)

Operable Unit 25 (Site LF-07)

Operable Unit 28 (Site LF-10)

Operable Unit 29 (Site LF-11)

Operable Unit 30 (Site LF-12)

Institutional Controls including:

- a. Within 90 days of ROD signature, the USAF shall prepare and submit to EPA and VDEQ for review and approval an Institutional Control Implementation Plan (ICIP) for implementing, monitoring, at a minimum annually reporting on and enforcing the institutional controls at OUs 25, 28, 29, and 30. This ICIP will be appended to and be an enforceable part of this ROD. The USAF shall monitor the ICs on the frequency determined as part of the ICIP. At a minimum, the following information shall be included in the ICIP:
 - i. Identification of the OU 25, 28, 29, and 30 IC objectives
 - prohibit residential and commercial use
 - prohibit industrial use that is inconsistent with exposure assumptions
 - maintain the integrity of the soil cover
 - prevent construction of facilities or structures or other land disturbance activity into or on the surface of the landfill;
 - ii. A description of the actions required to achieve each IC objective (e.g., prepare a survey plat) for OUs 25, 28, 29, and 30;
 - iii. A description of how the USAF is monitoring and enforcing the IC requirements for OUs 25, 28, 29, and 30 ;
 - iv. A description of the process for removing or modifying the ICs; and

v. Identification of the monitoring frequency and requirements.

- b. The Air Force will submit to the EPA and VDEQ, a monitoring report on the status of their ICs at least annually. The IC monitoring report, at a minimum, must contain:
 - i. An evaluation of whether all the facility-wide and IC commitments are being met, including results of visual field inspections of all areas subject to restrictions;
 - ii. Description of any deficiencies in the ICIP and BICIP and what efforts or measures have been or will be taken to correct problems.
- c. The USAF shall notify the EPA and VDEQ within 72 hours upon discovery of any activity that is inconsistent with the OU 25, 28, 29, or 30 IC objectives for the site, or of any change in the land use or land use designation of a site addressed under the comprehensive facility-wide list required in the BICIP (as required by the ROD for LF-01, LF-05, LF-15, LF-18, LF-22 and FT-41) of all areas covered by any and all decision documents at the facility that have or should have ICs for protection of human health or the environment. The USAF shall also identify the cause of the problem with the IC process, evaluate how to correct the BICIP and/or ICIP to avoid future problems, and implement these changes after obtaining the approval of EPA and VDEQ.
- d. The USAF shall request funding and document its efforts to obtain funding to institute and maintain institutional controls.
- e. The USAF shall notify EPA and VDEQ at least six (6) months prior to any transfer, sale or lease of any property subject to ICs under the terms of a decision document so that EPA and VDEQ can be involved in discussions to ensure that appropriate provisions are included in the conveyance documents to maintain ICs.
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and enforcing land use restrictions to prohibit all uses other than recreational, maintain the integrity of the soil cover, and prevent construction of facilities or structures or other land disturbance activity onto or on all the surface of the landfill for the duration of the remedy.

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- i. The Air Force shall supply a copy of the plat and ensure the incorporation of these restrictions into any real property documents necessary for transferring ownership from the United States, in the unlikely event that the United States sells or transfers the property. The real property document would also include a discussion of the National Priorities List (NPL) status of this Site, as well as a description of the soil contamination and buried waste materials. The Air Force shall submit the survey plat to the City of Hampton recording authority for the purpose of providing public notice of the environmental conditions of and limitations on the use of the property. (No property right or interest is intended to be nor shall be created by such notice.) In addition, the Air Force shall enter a note, in the local land use recording office, to the real property document evidencing U.S. ownership of the property on which the OU is located that shall notify interested parties that the site was previously used as a disposal area.

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administrative, financial, and technical details and requirements for inspecting, operating, and maintaining the selected remedial action. The Five-Year Review Report shall contain the findings and conclusions of the review, including recommendations, follow-up actions to issues, and a protectiveness determination. The Remedial Action Completion Report(s), the Operation and Maintenance Plan(s) and the Five-Year Review(s) shall be incorporated into and be an enforceable part of this ROD.